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No. 87-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CREATIVE BATH PRODUCTS, INC.,
MATHIAS MEINZINGER AND GUNTHER BARTSCH,
Petitioners,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
AND ROBERT FERINA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Court of Appeals erred in determining that alleged fraudulent acts committed by respondents during the course of the sale to petitioners of a single life insurance plan, without any evidence of the existence of an enterprise whose illicit activities or unlawful goals are of a continuing nature, failed to constitute the pattern of racketeering activity required to allege a cause of action under RICO?

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BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

This case presents precisely the allegations of garden-variety fraud which RICO was never intended to reach, *viz.*, the sale of key-man insurance on the lives of Meinzinger and Bartsch, the principals of Creative Bath.[1] After plenary pre-trial discovery, respondents moved for an order, pursuant to Fed. R. Civ. P. 9, 12(b)(1) and

[1] Respondents here adopt petitioners abbreviations of the litigants' names.

(6), and 56, granting summary judgment dismissing the amended complaint.[2] Petitioners were unable to substantiate their allegiations of fraud, and so the amended complaint was dismissed.

Connecticut General is a Connecticut corporation which has conducted an insurance business for over 100 years and is licensed to do, and is doing, business in New York under the supervision of the New York State Superintendent of Insurance. Ferina is an insurance agent, licensed by the State of New York, who is authorized to sell Connecticut General insurance policies.

On September 10, 1984, Ferina presented an insurance plan to Meinzinger and Bartsch entitled "Coordinated Business Financial Planning for Gunther Bartsch & Matt Meinzinger" (the "insurance plan") which recommended, among other things, that the petitioners purchase insurance from Connecticut General.

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[2] In conflict with federal and state law, petitioners initially brought this action in the New York Supreme Court, County of New York. After respondents moved to dismiss, petitioners voluntarily discontinued the state court action and filed a federal complaint in the United States District Court, Eastern District of New York. After completion of discovery, respondents moved, pursuant to Fed. R. Civ. P. 9, 12(b)(1) and (6) and 56, to dismiss the first federal complaint. By order dated January 6, 1987, the District Court granted the motion but gave petitioners leave to replead. Petitioners thereafter served an amended federal complaint, essentially alleging the same vague facts and claims previously set forth. Respondents renewed thier motion to dismiss, pursuant to Fed. R. Civ. P. 9, 12(b)(1) and (6) and 56 on the grounds, among others, that the indisputable material facts showed that petitioners had no claim under the RICO statute. Respondents also moved for an award of sanctions under Fed. R. Civ. P. 11. By order dated April 17, 1987, the District Court granted respondents' motion for dismissal and directed that judgment be entered in favor of respondents dismissing petitioners' action. Ironically, while petitioners now seek the extraordinary writ of certiorari with respect to the second federal dismissal, they did not see fit to submit a memorandum of law in opposition to respondents' motion.

Later that same day, and pursuant to other terms of the insurance plan, Meinzinger and Bartsch each signed and delivered to Ferina applications for four Connecticut General life insurance policies for a death benefit in the total amount of $2,200,000.00. The purpose of the insurance was to fund a buy-sell agreement by which Meinzinger and Bartsch would be given the right to purchase the others interest in their business in the event of either person's death.

On October 25, 1984, Meinzinger and Bartsch signed policy receipts which acknowledged delivery by Ferina, on that same day, of the Connecticut General policies [3] to them, and delivered to Ferina their Company's checks, payable to Connecticut General, in the amount of $41,800.00, representing the first years' premiums on the insurance. There is no issue that petitioners received the life insurance coverage applied for, and if either Bartsch or Meinzinger had died during the policy period, the death benefit would have been payable.

Petitioners claim that Ferina misrepresented to them that the policies purchased could be returned at any time without penalty. On the cover page of each policy funding the insurance plan there appears, prominently displayed, the legend that the policy may be returned within 10 days after its receipt, pursuant to the requirement of N.Y. Ins. L. § 3203(a)(11) (McKinney's 1985). Also, the policy receipts signed by Meinzinger and Bartsch state that "I understand that I have 10 days to thoroughly examine this policy. If I should decide it is not acceptable, I can return it no later than 10 days from this date for a full refund of premium."

Petitioners also claim that Ferina misrepresented that at the end of the first year each policy would have a

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[3] Both the form and substance of the policies, and the applications annexed thereto, were approved by the Superintendent of Insurance pursuant to N.Y. Ins. L. § 3201 (McKinney's 1985).

substantial cash surrender value. Included in the policies, as required by N.Y. Ins. L. § 3203(a)(7)(B) (McKinney's 1985), and listed in the policies' Table of Contents, is a table of surrender charges. To repeat, the policies in question were approved, as to form and substance, by the New York State Superintendent of Insurance acting under N.Y. Ins. § 3201 (McKinney's 1985).

In addition petitioners claim that Ferina placed a statement in the application for the policies that no policies were being replaced when he knew that the policies were in fact being replaced. In signing the policies containing the alleged misrepresentation, petitioners declared that they had "read the above questions and answers . . . [and] that they are complete and true to the best of my knowledge and belief."

It is indisputable from the contemporaneous documents exchanged between the parties, and the deposition testimony of the petitioners herein, that there occurred only one single transaction involving the sale of life insurance funding one insurance plan, that the transaction terminated with the sale of the insurance and that no fraud was perpetrated in connection with this sale of insurance or any other sale by respondents. Indeed, apart from the foregoing transaction, petitioners could point to no conduct by respondents which was allegedly fraudulent or otherwise constituted racketeering activity.

Thus, in dismissing petitioners' action for the second time, the District Court specifically found that petitioners failed to offer any proof that respondents had committed acts of fraud in relation to other applicants for insurance coverage. On the issue of whether respondents committed acts of fraud in relation to the petitioners, the Court noted:

> "[r]eference to the actual insurance policies themselves, the form of which has been approved by the New York State Superintendent of Insurance as re-

quired by N.Y. Ins. Law § 3201, quickly reveals that a "Table of Contents" on page 2 lists a "Table of Surrender Charges" at page 5 where such charges are explicitly set forth by policy years. Plaintiffs, therefore, have failed adequately to support their claim that defendants engaged in a pattern of improper activities in the sale of insurance policies."

Petitioners appealed the dismissal of their action to the United States Court of Appeals for the Second Circuit. In an opinion dated January 20, 1988, the Second Circuit affirmed the District Court's dismissal of petitioners' claim. Thereafter, petitioners petitioned this Court for a writ of certiorari to the Second Circuit. Shortly after filing the petition for writ of certiorari, petitioners requested this Court to defer consideration of their petition for writ of certiorari on the grounds that the Second Circuit was convening to hear reargruments, *en banc*, in *Beauford v. Helmsley*, 843 F.2d 103 (2d Cir. 1988), *reargued* (June 13, 1988) (decision pending), which "treats this case extensively." To date, no decision has been issued by the *Beauford en banc* panel.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Warrant Supreme Court Review.

Petitioners' RICO claim against respondents is premised upon alleged acts of mail and wire fraud committed during the course of the sale of a single life insurance plan. Petitioners argue that the Second Circuit's definition of "pattern of racketeering activity," as interpreted by petitioners, prevents RICO from being used against "legitimate enterprises which are tainted with a short lived but broad 'pattern of racketeering activity'." Petition For Writ of Certiorari at p. 13. The facts proved below, however, do not support the broad argument petitioners foist upon this Court. The District Court specifically found that, after extensive discovery, petitioners offered no evidence that the respondents were engaged in

acts of fraud in relation to other applicants for insurance coverage. In addition, the District Court indicated that the terms of the insurance policies in question belied the allegations that respondents had committed acts of fraud in relation to the petitioners. Petitioners' action against respondents was dismissed accordingly.

It is clear that no matter what asserted test is applied, petitioners have not stated a claim under RICO. The fraudulent acts alleged by petitioners are not the type of fraud which RICO was designed to prevent. Not only have petitioners alleged mere "garden-variety" fraud, but also fraud that allegedly occurred in an industry that is traditionally and heavily regulated by state law, here New York, as in virtually every other state.

In addition, petitioners have misconstrued the Second Circuit's decision in this case. In appealing the dismissal of their amended complaint to the Second Circuit, petitioners phrased the question presented for review, and premised their argument upon [4], whether the RICO statute requires multiple schemes to constitute a pattern of racketeering activity.

The dismissal of the amended complaint was affirmed by the Second Circuit on the grounds that petitioners failed to establish "continuity" as that factor relates to RICO enterprise. The question presented for review in the petition for writ for certiorari is phrased in terms of whether a RICO claimant must allege an illegal enterprise. The Second Circuit has never required, nor does their decision herein hold, that a RICO enterprise be an unlawful operation. *See United States v. Angelilli*, 660

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[4] Respondents again note that petitioners did not present any legal argument, as required by Local Rule 3(b) of the Southern and Eastern Districts, in opposition to respondents' motion to dismiss the amended complaint.

F.2d 23, 31-35 (2d Cir. 1981), *cert. denied, Ribotsky v. United States*, 455 U.S. 910 (1982) (governmental units such as the New York City Civil Court are RICO "enterprises"); *United States v. Mannino*, 635 F.2d 110, 117 (2d Cir. 1980); *State of New York v. O'Hara*, 652 F. Supp. 1049, 1053 (W.D.N.Y. 1987) (city of Niagara Falls was a RICO "enterprise").[5] The dismissal of petitioners amended complaint was affirmed because petitioners can not establish any "continuity" on respondents' part in relation to fraudulent acts committed during the course of the sale of insurance policies.

Since petitioners amended complaint fails to allege, and no facts were adduced to prove, any "pattern of racketeering activity," the petition for writ of certiorari should be denied.

II. The Issues Presented In The Petition Are Already Before This Court.

In essence, the petitioners seek a determination of whether alleged fraudulent acts committed by respondents during the course of the sale of one insurance plan, without more, satisfies the "pattern of racketeering activity" required to establish a cause of action under RICO. On March 21, 1988, this Court granted certiorari to review the definition of "pattern of racketeering activity" in an Eighth Circuit case, *H. J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1988), (*en banc*), *cert. granted*, 56 U.S.L.W. 3647 (March 21, 1988). Petitioner's reply brief was scheduled to be filed on July 7, 1988, with argument anticipated for the November term. In *H. J. Inc.*, *supra*, the plaintiffs alleged that the defendant undertook to illegally influence members of the Minnesota Public Utilities Commission (MPUC), the state regulatory agency responsible for determining the de-

[5] Petitioners argued to the Second Circuit that "there is not now, nor has there ever been, a requirement that a RICO 'enterprise' be an unlawful operation."

fendant's rates. The Eighth Circuit affirmed the lower court's dismissal of the complaint on the grounds that it failed to satisfy the continuity requirement of "pattern of racketeering activity," since it alleged no more than fraudulent acts committed in furtherance of a single scheme to influence MPUC commissioners . . . ." *Id.* at 650. Although *H.J. Inc., supra*, defined "pattern of racketeering activity" in terms of "continuity plus relationship," and the Second Circuit, in this case, defined "pattern of racketeering activity" in terms of continuity in relation to the RICO enterprise, the issues are so entwined that separate decisions from this Court are not likely to clarify what constitutes a RICO "pattern of racketeering activity." In addition, this case, and the cases relied upon in the Second Circuit's decision, have been interpreted to hold that a single criminal episode or scheme does not charge a claim under RICO. *See Beauford, supra* at p. 110. Therefore, since the question of what constitutes a RICO "pattern of racketeering activity" is already before this Court, petitioners request for a writ of certiorari should be denied.

III. The *Beauford En Banc* Decision Will Provide A Better Vehicle For Review.

Much of petitioners' argument in support of the issuance of a writ of certiorari is devoted to the Second Circuit's most recent decision defining RICO's "pattern of racketeering activity" requirement, *Beauford, supra.* The plaintiffs in *Beauford* alleged that the defendants committed various acts of fraud in offering condominiums in an apartment building complex for sale pursuant to an offering plan. After an extensive discussion of district courts', courts of appeals' and the Second Circuit's interpretation of "pattern of racketeering activity," Judge Oakes affirmed the District Court's dismissal of plaintiffs' complaint on the grounds that a "discreet, even if widespread, and a continuing even if finite,

scheme" to defraud plaintiffs is not sufficient to satisfy RICO's "pattern of racketeering activity" requirement. *Id.* at p. 110.

Judge Oakes' lengthy opinion, unlike the Second Circuit opinion in this case, interprets the decisions, including this case, regarding the RICO "pattern of racketeering activity" requirement that have been rendered by the Second Circuit since this Court's decision in *Sedima, S.P.R.L. v. Imex Co. Inc.*, 473 U.S. 479 (1985). In affirming the dismissal of plaintiffs' complaint, Judge Oakes requested that the case be "reheard *en banc* to clarify Second Circuit law." *Id.* at p. 110. On June 13, 1988, the Second Circuit reheard *Beauford, en banc*, and *United States v. Indelicato*, No. 87-1085 (2d Cir. 1988), *reargued* (June 13, 1988), a criminal RICO case. As of this date, decisions have not been rendered.

The decision to be rendered by the Second Circuit *en banc* in *Beauford* will result in a more definitive interpretation of "pattern of racketeering activity." This Court should not grant a writ of certiorari in this civil case, wherein one panel of the Second Circuit merely relied upon existing precedent, when the entire Second Circuit is about to render a decision that is intended to clarify and set forth its concept of "pattern of racketeering activity" in both civil and criminal cases.[6] To grant a writ of certiorari in a case decided prior to the decision in *Beauford*, will only lead to confusion rather than clarification of what constitutes a "pattern of racketeering activity."

Finally, in the event that this Court chooses to grant petitioners' request for a writ of certiorari, this case

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[6] The Second Circuit's rehearing *en banc* is a proper response to this Court's admonition that the "extraordinary" uses to which civil RICO has been put are due, in part, to the failure of the courts "to develop a meaningful concept of 'pattern.'" *Sedima, S.P.R.L. v. Imex Co. Inc.*, 473 U.S. 479, 500 (1985).

should be consolidated with *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1988), *cert. granted*, 56 U.S.L.W. 3647 (March 21, 1988) now pending, and the *Beauford en banc* decision when issued.

CONCLUSION

Because the issues presented are already before this Court, and the Second Circuit, *en banc*, is about to render decisions in a criminal and civil action defining RICO "pattern of racketeering activity," and, most importantly, because the petitioners can not establish a RICO claim, the petition for writ of certiorari should be denied.

Respectfully submitted,

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